Nos. 22-277, 22-555

In The Supreme Court of the United States

ASHLEY MOODY,
Attorney General of Florida, et al.,

Petitioners,

v.

NETCHOICE, LLC, dba
NETCHOICE, et al.

NETCHOICE, LLC, et al.,

Petitioners,

v.

KEN PAXTON, Attorney General of Texas.

On Writs Of Certiorari To The United States Courts Of Appeals For The Fifth And Eleventh Circuits

AMICUS CURIAE BRIEF OF THE CENTER FOR RENEWING AMERICA IN SUPPORT OF PETITIONERS IN 22-277 AND RESPONDENT IN 22-555

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INTERESTS OF AMICUS[1]

The Center for Renewing America, Inc. works to rebuild a consensus of America as a nation under God with a unique purpose worthy of defending. This purpose flows from its people, institutions, and history, where individuals' enjoyment of freedom is predicated on just laws and healthy communities. The Center expresses its views on behalf of all Americans who seek to further these interests free from the dominant internet platforms' discrimination and censorship. The Center looks to HB 20 as an important step in preserving free speech in America.

SUMMARY OF ARGUMENT

The sharp differences of opinion between *NetChoice v. Att'y Gen., Fla*., 34 F.4th 1196 (11th Cir. 2022) and *NetChoice v. Paxton*, 49 F.4th 439 (5th Cir. 2022), require a close reexamination of the principles that should underlie the regulation of Social Media Platforms (SMPs). NetChoice and its defenders start from the assumption that long-established principles of First Amendment law protect in absolute fashion their editorial judgments that keep out not only pornography and obscenity but also various forms of disinformation that they deem harmful to the public at

[1] No counsel for any party authored this brief in whole or in part, and no person or entity other than amicus or its counsel made a monetary contribution to fund the preparation or submission of the brief. SUP. CT. R. 37.6.

large. In their view, First Amendment principles are constant so that they do not vary with technological changes and social circumstances.

The Texas statute challenges this view, looking to the unique powers that the SMPs have over the market, allowing them to favor or silence certain users and their viewpoints. The Texas statute is a regulatory response to this problem, as is the Florida statute. This Amicus Brief focuses chiefly on the Texas statute.

The strongest defense for the Texas statute rests on the massive technological changes that have transformed every aspect of how these platforms do business relative to earlier operations under simpler models. Today, these platforms operate as huge communication hubs whose basic operations are subject to powerful network effects. In this environment, those networks that maximize the useful interconnections for their subscriber base will quickly emerge as dominant, as the marginal consumer will tend to prefer the greater accessibility of the large network to the fewer options available on fringe networks. These dominant firms are then in a position to engage in powerful forms of discrimination that can drive certain businesses from their sites.

In addition, the web services operations of these SMPs allow them to terminate any recalcitrant firm without notice and without a hearing, which expands their control over SMP content that prevents certain firms, like Parler, from reaching their target audience. And most ominously, it is highly likely that these SMPs

coordinate their activities in ways that violate the antitrust laws. It is now established beyond any doubt that various federal government agencies have used both carrots and sticks to get the SMPs to follow government policies without publicly acknowledging that these SMPs have lost their intellectual and political independence.

The Texas law rests on the major premise that viewpoint discrimination by the government is a cardinal sin. HB 20's viewpoint discrimination prohibition ensures that neither SMPs nor the government working through them will slant and control the direction of public discussion by excluding unwelcome or unconventional views.

There is nothing in the caselaw that blocks Texas' conclusions. NetChoice relies on overreading cases in the pre-SMP era where this Court held that states could not force newspapers to publish replies to their editorials, *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 258 (1974); public utilities to carry in their billing envelopes messages contrary the position of these companies, *Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n*, 475 U.S. 1, 21 (1986); or, parade organizers to include marching groups that might convey objectionable messages, *Hurley v. Irish-American Gay, Lesbian & Bisexual Grp. of Boston, Inc.*, 515 U.S. 557, 559 (1995).

But these cases are irrelevant given that the SMPs have all the indicia of illicit monopoly control of speech, which justifies the imposition of a narrow remedy, such as the viewpoint discrimination prohibition

in Section 7 of HB 20, TEX. CIV. PRAC. & REM. CODE § 143A.002, that allows individuals to present their views on issues of vital social concern unimpeded by their political adversaries.

ARGUMENT

I. There is a principled case for limited government regulation of the information markets that are dominated by the social media platforms (SMPs)

Section 7 of HB 20 reads as follows:

> A social media platform may not censor a user, a user's expression, or a user's ability to receive the expression of another person based on
>
> > (1) the viewpoint of the user or another person;
> >
> > (2) the viewpoint represented in the user's expression or another person's expression. . . .

TEX. CIV. PRAC. & REM. CODE § 143A.002.

This statute changes the current law under which SMPs enjoy the unbridled ability to determine which materials stay or are removed from their platforms. Under current law, the SMPs claim absolute authority to exclude not only lewd, obscene, and defamatory material but also to publish only one side of a controversial public issue. They have determined the proper

social response to COVID and the proper way to treat the alleged dangers associated with global warming even though these are controversies for which it is critical that private parties, businesses, think tanks, academics, and government freely debate to come up with correct answers. *See*, *e.g.*, F.D. Flam, *Facebook, YouTube Erred in Censoring Covid-19 'Misinformation': The lab leak theory is just the latest example of a Covid-19 idea that was prematurely debunked*, BLOOMBERG, June 7, 2021, http://tinyurl.com/2kcww5rd.

The defenders of the status quo often instruct the individuals whose posts are removed that it is done to make the community "safe" against "misinformation." The SMPs claim misinformation is contained in many of the posted materials that are removed silently from their site. Yet the SMPs typically do not explain their actions other than that the content does not meet the requisite safety standard. But the power they claim does not depend on any purported demonstration of the falsity of that information or soundness of the social policy these SMPs promote, but solely on their decision to take it down, even without notice to the party who has posted that information.

The SMPs insist that the First Amendment guarantees this level of absolute discretion and does so on the implicit ground that those persons shut out from one site can publish on another. Media L. Res. Ctr. Br. 8. The SMPs justify their absolute power to control content because alternative platforms are available to those who are excluded from a given site. NetChoice

Pet. Br. 42-43. They also claim that the size of the network and its audience is, in their view, utterly irrelevant to the First Amendment protection to which they are entitled. NetChoice Pet. Br. 44.

Texas disputes the pollyannaish assumption that the free play of market forces smooths the rough edges of this system and allows the public to obtain from multiple sources all the information they need for the informed decision-making that is the goal of the First Amendment. In particular, there is scant recognition of whether these SMPs exercise a degree of monopoly power sufficient to deny other firms the power of free entry and exit that keeps information markets robust. Hence, NetChoice refuses to address whether some form of carefully calibrated regulation can help create a robust information market available to all rival viewpoints. NetChoice Pet. Br. 43-45.

The key weakness in NetChoices' and their amicis' argument is its unexamined assumption that the web is a place where competitive forces are in constant churn, so that individuals and groups that are dissatisfied with one SMP can easily migrate to another. NetChoice Pet. Br. 24; Ctr. for Growth and Opportunity Br. 20. Historically, that form of entry and exit has not been observed, as this market for many years has been characterized by persistent domination by the same basic firms—Apple, Facebook (Meta), Google, and X (Twitter)—which offers good reason to believe that these markets are far more insulated from new entry than the model of pure competitive markets suggests.

Multiple reasons explain this pattern of economic behavior and justify Texas' response.

A. Common carriers and public utilities: monopoly and network effects

The basic economics that developed in connection with traditional public utilities and common carriers assumed that these companies make high front-end, fixed-cost capital investments, after which they face a constant marginal cost for each additional unit of production. RICHARD A POSNER, NATURAL MONOPOLY AND ITS REGULATION 4-15 (30th Anniversary ed., 1999). Assuming declining marginal cost, it follows that one firm can serve the market more efficiently than two or more firms, and any entry by a second firm is impossible. This is because a second firm will not be able to incur the front-end cost to start its operation while having a reasonable expectation of recouping the investment. In practice, these austere assumptions are rarely met, so that firms with dominant (but not absolute) positions are able to leave their would-be competitors to fight over the remaining scraps.

In these cases, it may not be possible to break up the utility or common carrier (which supplies such critical services as gas and electricity, transportation, or communications) as could the government in other sorts of industries (e.g., banks or insurance companies), due to the efficiencies that one utility or common carrier can offer. This basic point has been well-understood since the 17th century. Sir Matthew Hale wrote

De Portibus Maris, taking the position that while it was always permissible for ordinary markets to charge what the market would bear, in markets "affected with the public interest," the rates had to be reasonable in order to reduce the risk of monopoly power. Matthew Hale, *De Portibus Maris*, in 1 A COLLECTION OF TRACTS RELATIVE TO THE LAW OF ENGLAND 77-78 (Francis Hargrave ed., 1787). He found such a situation in wharves, which, given their expense to build and limited geographic positions where they could be built, exercised market power that could be disciplined.

The point was carried into law in *Aldnutt v. Ingles*, 12 East 527 (1810), where Lord Ellenborough wrote:

> There is no doubt that the general principle is favored, both in law and justice, that every man may fix what price he pleases upon his own property, or the use of it, but if for a particular purpose the public have a right to resort to his premises and make use of them, and he have a monopoly in them for that purpose, if he will take the benefit of that monopoly, he must, as an equivalent, perform the duty attached to it on reasonable terms.

Id. at 537.

These exact words were carried over into the American law in *Munn v. Illinois*, 94 U.S. 113, 127-28 (1876), where they ushered in an era of ratemaking for public utilities that is far more complex than the regulation needed in *Aldnutt*—or contemplated in HB 20 whose purpose is to force firms, to the extent possible, to behave as if they were in a competitive market. *See*

RICHARD A. EPSTEIN, PRINCIPLES FOR A FREE SOCIETY: RECONCILING INDIVIDUAL LIBERTY WITH THE COMMON GOOD, Ch. 10 (1998); *see also* Harold Demsetz, *Why Regulate Utilities?* 11 J. LAW & ECON. 55 (1968).

B. SMPs and the traditional regulation of market power

The regulation of social media platforms presents an instructive variation on this historical theme. Here, the common element is the so-called "network effects," a key economic feature largely ignored by NetChoice and its amici. In a market exhibiting network effects, the initial dominant firm will tend to displace all rivals because it can supply greater benefits to its customers than are obtainable from two or more firms. This is because a larger network is more valuable to consumers. They would prefer a network with a large and stable customer base because it will allow network members to reach more individuals with whom they can share information. Michael L. Katz & Carl Shapiro, *Systems Competition and Network Effects*, 8 J. ECON. PERSPS. 93, 96 (1994).

With SMPs, there is an additional wrinkle, making large networks more efficient. SMPs' competition for market dominance is typically not over price, as the SMPs usually offer their goods at zero price. Rather, they earn revenue by selling the information that they glean from their users or by selling forms of advertisements for their users' consumption. The more network members SMPs have, the more information they get to

sell and the more valuable their advertising venues become. *See generally* Michael L. Katz & Carl Shapiro, *Network Externalities, Competition, and Compatibility*, 75 AM. ECON. REV. 424, 424 (1985) (stating that one firm tends towards dominance because "the utility that a user derives from consumption of the good increases with the number of other agents consuming the good").

Hence, it is a characteristic of these networks for a single firm to become dominant. It does not follow, however, that the same SMP will remain dominant for all time. MySpace lost its preferred position to Facebook, which is now subject to losing customers to TikTok and other specialized firms. But these transitions do not typically result in the emergence of a stable competitive market with, say, a half-dozen firms of roughly equal size and ability. Instead, the pattern is that one dominant firm in each market niche will, under various conditions, displace the others so that the monopoly power in question moves from one firm to another.

In the information space, the monopoly risk is not over price. Rather, monopolists can raise prices *or* reduce output and quality. And the latter is what happens when one firm decides, for whatever reason, to push one side of a social debate. The status quo defenders never offer a reasoned response to this problem but act as if the invocation of the First Amendment will cure all evils, without once asking whether the misinformation they wish to stop is contained in the posts that they allow to remain on their sites. NetChoice Pet.

Br. 6-7. Their silence points to the need for limited, targeted regulation, not continued indulgence of SMPs' unrestrained actions.

Of course, caution is needed. The costs and potential abuses of an ill-designed system of heavy-handed regulation are often more dangerous than the admitted dangers of an unregulated SMP market. But it should always be remembered that the ultimate concern with the government regulating information markets is that it imposes content restrictions on some groups but not others. The SMPs' approach creates a forced cross-subsidization in which the silenced group of citizens subsidizes the groups the government allows to speak—resulting in a lopsided public debate. In the SMP market, the SMPs *already* impose targeted content restrictions. A sensible set of regulations can largely mitigate this form of abuse without introducing new risks of its own.

In fact, the case in favor of limited regulation of the SMP market is greater than this due to significant entry barriers. In practice, this task of new entry is always tricky because the linkage to the overall network depends on connections that are made either through a small number of large web hosting firms, such as Amazon Web Services, Apple's cloud support services, and Google Cloud web hosting. If these firms sever their connections to competing platforms, either outright or by the charge of high fees, it becomes extraordinarily expensive for any new firm to establish its own presence on the web to conduct its consumer-facing end of the business.

Parler, a start-up social network, suffered just that fate. After its launch in 2018, Parler grew rapidly, only to be cut off from these critical web services in January 2021, days after the events of January 6, 2021. Amazon, Apple, and Google all cut off their web services in unison because of their deep disapproval of Parler's response to January 6. *Parler social network drops offline after Amazon pulls support*, BBC NEWS, Jan. 11, 2021, http://tinyurl.com/yc5cpbjt. Amazon pulled its support services because of statements of violence, so-called, without giving any notice to Parler as to why the firm was singled out for special treatment, why it was not offered an opportunity to give its side of the story before the removal took place, or asking whether the three companies continued to provide support services to other content producers engaged in similar conduct, or whether some lesser sanction was appropriate. *See* Jack Nicas & Davey Alba, *Amazon, Apple and Google Cut Off Parler, an App That Drew Trump Supporters: The companies pulled support for the "free speech" social network, all but killing the service just as many conservatives are seeking alternatives to Facebook and Twitter*, THE NEW YORK TIMES, Jan. 9, 2021, https://www.nytimes.com/2021/01/09/technology/apple-google-parler.html.

None of NetChoices' many amici examine this problem in much detail. *See*, *e.g.*, Am. Jewish Comm. Br. 8-9; Hasen, Nyhan & Wilentz Br. 5-6 n.10. But the most obvious explanation is that all three networks, enjoying significant market power, can indulge political animus against former President Trump and his

supporters without competitive consequence. Now that Parler's voice is silenced, no new conservative network has risen to fill that gap. If the web support for SMP markets were competitive, surely some other platform would have picked up the slack. But potential entrants, who need to invest many millions to launch, have learned their lesson. What happened to Parler could happen to them for any reason or pretext. The dominant players can routinely gin up some violation against a disfavored SMP to either block entrance in the first place or to remove it once it is in active operation. The proof here is in the pudding. No competitive market behaves that way.

C. SMPs, collusion, and market dysfunction

In addition to potential collusion with firms on the supply side of internet service, right now, the SMPs appear to be colluding with each other, violating the antitrust laws in their interactions with consumers. As a general matter, it is firmly established that the protections offered to the press under the First Amendment are subject to antitrust restrictions that do not allow two or more newspapers to collude to raise prices, divide markets, or exclude outsiders. *Associated Press v. United States*, 326 U.S. 1, 7-14 (1945) (antitrust violation to refuse to sell its news to nonmembers of their organization).

The question of coordination is not an open one on the customer side of the market due to the involvement of the federal government, which used sticks and

carrots to coordinate behavior among the SMPs. Professor Eugene Volokh documents several important cases in which individuals who had questioned the once-prevailing theory that the spread of the COVID-19 virus came from nature and not a leak from the Wuhan Virus Laboratory—just as there are today many reputable parties that think that the laboratory leak was the more credible explanation—were censored. There were further efforts to silence the New York Post exposé of Hunter Biden's laptop, as well as the purchases of private homes by a leader of Black Lives Matter. *See* Eugene Volokh, *Treating Social Media Platforms Like Common Carriers?*, 1 J. FREE SPEECH L. 377, 395-05 (2021).

Two points should be made. The suppressed stories were true. And the public debate suffered from the want of important information.

A similar tale can be told about the public statements of the Biden administration that vaccines were a key necessity, including President Biden's widely echoed statement that the "tech giants" were not doing enough to overcome the public's resistance to taking the vaccine, which Biden walked back as only insisting that his statement was a call to these companies to act. President Biden also denounced those individuals whom he claims spread misinformation. *See* Zeke Miller & Barbara Ortutay, *Biden says 'killing people' comment meant to stoke tech action on misinformation*, L.A. TIMES, July 19, 2021, http://tinyurl.com/2p8mxfyj.

But at no point did President Biden make any reference to the elephant in the room, namely, the covert campaign of influence secretly directed toward the SMPs that are made plain by the record now assembled in *Missouri v. Biden*, 83 F.4th 350 (5th Cir. 2023), *cert. granted sub nom., Murthy v. Missouri*, 144 S. Ct. 7 (2023). The suit was brought by eminent researchers, including Stanford University's Jayanta Bhattacharya and Martin Kuldorff, formerly of Harvard University. They are two prominent physicians who initiated the Great Barrington Declaration, available at https://gbdeclaration.org/, with close to a million signatories who made the case against the COVID-19 lockdowns. Anthony Fauci tried to discredit them, and Fauci was, in fact, named as a defendant in *Missouri v. Biden*, 83 F.4th 350, along with Xavier Becerra, the current Secretary of Health and Human Services.

As the Fifth Circuit in *Missouri v. Biden* found, for the last few years—at least since the 2020 presidential transition—federal officials have been in regular contact with major American social media companies about the spread of "misinformation" on their platforms. Those officials—hailing from the White House, the CDC, the FBI, and a few other agencies—urged the platforms to remove disfavored content and accounts from their sites. And the platforms seemingly complied. They gave the officials access to an expedited reporting system, downgraded or removed flagged posts, and de-platformed users. *Missouri*, 83 F.4th at 358-61.

The Plaintiffs in *Missouri v. Biden* maintain that although the platforms stifled their speech, the government officials were the ones pulling the strings—they "coerced, threatened, and pressured [the] social-media platforms to censor [them]" through private communications and legal threats. *Missouri*, 83 F.4th at 359.

This persistent pattern of abuse thus started at the highest levels of government. It is equally clear that the government and SMPs' behavior involved explicit content discrimination, targeting eminent parties whose opposing views were unceremoniously driven off these platforms. It appears, moreover, that these coordinated attacks on major players were conducted *in secret* to give the appearance that the SMPs had reached their decisions independently, to conceal the fact that the government, in its own disinformation campaign, was speaking with multiple voices. These SMPs therefore forfeit their status as free players entitled to unquestioned First Amendment protection. But in an alternative scenario, the government coerced these carriers, who, when they yielded to these threats, became government pawns who again forfeited the right to any government protection. Whether the SMPs were co-conspirators, victims, or both is irrelevant because whether the SMPs cooperated or were coerced, the dire effect on these plaintiffs in *Missouri v. Biden* and other third parties is the same.

Viewpoint discrimination may be critical for individual participants in information markets. But when done by the government, it is a cardinal constitutional sin that must be countered here before it becomes

standard practice everywhere. Because these companies no longer have meaningful independence, it is now permissible for state legislatures to counteract the massive and admitted abuses of the federal government. HB 20 is a reasonable response.

II. HB 20 is a narrow, focused, and well-tailored remedy

The only question here is to fashion a remedy that fits the crime. The best answer to that question is one that imposes a modest burden on the SMPs to counter the well-identified abuse. In this case, the remedies advanced by Texas fit the crime committed by the government and the SMPs by insisting that major SMPs allow people on both sides of controversial issues to speak their peace. Smaller companies are out from under these mandates because their ability to exercise market power and powerfully collude is minimal.

In reply, it is constantly said that "content moderation" is needed to contain obscenity, pornography, and violence that could easily drive responsible or sensitive viewers from the SMPs' sites. DOJ Br. 3-7. But the proper response is to take a leaf from the law of common carriers as applied to transportation companies. They must take all customers who can pay the fares under a nondiscrimination rule that prevents them from targeting any class of persons by, for example, race or sex. *Mitchell v. United States*, 313 U.S. 80, 94–95 (1941). But those general rules have never prevented these carriers from removing, by force if

necessary, those few customers who engage in violent, abusive, loud, or disruptive behavior. *Lampkin v. Chicago Great Western R. Co*., 44 P.2d 210, 210-11 (Kan. 1935); *Willard v. St. Paul City Ry*., 116 Minn. 183, 185 (1911). It is therefore possible to maintain decorum without using "content moderation" as a club to dispense with disputes over the efficacy of masks, the need for lockdowns, the restrictions on the use of Ivermectin and Hydroxychloroquine, or the efficacy or side effects of the various rounds of COVID-19 vaccines.

Moreover, these statutes are well-tailored and targeted as they are limited to the dominant platforms, defined under the Texas statute as a platform with "more than 50 million active users in the United States in a calendar month." TEX. CIV. PRAC. & REM. CODE § 143A.004(c). This limitation exists because, as the record shows, only platforms of this size engaged in the questionable conduct described here, and they are the only SMPs that the government targeted with carrots and sticks to advance certain, approved views.

A. The Texas statute is consistent with the First Amendment

To bolster their attack against HB 20, NetChoice and its many amici take refuge in three classic First Amendment cases that were decided long before the rise of SMPs: *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241 (1974); *Pacific Gas & Elec. Co. v. Public Util. Comm'n of Cal*. (*PG&E*), 475 U.S. 1 (1986); *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of*

Boston, Inc., 515 U.S. 557 (1995). None of these three cases address any of the distinctive circumstances applicable in this context.

The question in *Tornillo* was "whether a state statute granting a political candidate a right to equal space to reply to criticism and attacks on his record by a newspaper violates the guarantees of a free press." *Tornillo*, 418 U.S. at 243. In ruling the statute unconstitutional, the Court wrote: "While many of the newspapers were intensely partisan and narrow in their views, the press collectively presented a broad range of opinions to readers. Entry into publishing was inexpensive; pamphlets and books provided meaningful alternatives to the organized press for the expression of unpopular ideas and often treated events and expressed views not covered by conventional newspapers." *Id*. at 248.

But the Court then continued to note that the modern press is often more complex and more concentrated, which raises the general issue of monopoly power. It then quoted extensively with approval the opinion in *Associated Press v United States*, 326 U.S. 1 (1945), which showed that it was well aware of the perils of monopolization when the dominant firm "hammers away on one ideological or political line using its monopoly position not to educate people, not to promote debate, but to inculcate in its readers one philosophy, one attitude—and to make money." *Tornillo*, 418 U.S. at 253 (quotations omitted).

But after mentioning the cost this statute imposed on the defendants, the Court turned to its more powerful finding that the Florida statute was defective "because of its intrusion into the function of editors. . . . The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials—whether fair or unfair—constitute the exercise of editorial control and judgment." *Id*. at 258.

Tornillo, when so understood, supports the Texas statute. The defense of editorial independence that lies at the core of *Tornillo* has already been hopelessly compromised by the government's heavy-handed interference in the editorial processes of these SMPs. The fear of government intrusion that drove the Supreme Court in *Tornillo* to stay its hand in this instance requires the courts to make sure that such interference does not contaminate the market for ideas on these critical issues. *Tornillo* did not face the risk of network effects that could create markets with dominant firms. New entrants to the newspaper business did not face the dangers of the withdrawal of web-based support, as did Parler. And at no point was there any hint of collusion between the newspaper and the government.

In *PG&E*, the Court answered, "whether the California Public Utilities Commission may require a privately owned utility company to include in its billing envelopes speech of a third party with which the utility disagrees." *PG&E*, 475 U.S. at 4. The issue arose because there was, in fact, "extra space" (free space in the billing envelop that did not increase postage rates),

and the California Public Utilities Commission (CPUC) wanted to use it for its advocacy, perhaps recognizing using "extra space" would not increase the rate base. *Id.* at 16. This question's answer turned largely on who owned that extra space in the envelope. Not surprisingly, CPUC said it did. But that flatly contradicted the general rule as stated in *Board of Public Utility Commissioners v. New York Tel. Co*., 271 U.S. 23 (1926), which strangely was not cited in *PG&E*. In *New York Telephone*, the Court made clear that its customers were ratepayers, not owners. Thus, Justice Butler wrote:

> Customers pay for service, not for the property used to render it. Their payments are not contributions to depreciation or other operating expenses, or to capital of the company. By paying bills for service they do not acquire any interest, legal or equitable, in the property used for their convenience or in the funds of the company. Property paid for out of moneys received for service belongs to the company, just as does that purchased out of proceeds of its bonds and stock.

New York Tel., 271 U.S. at 32.

The same point is stressed by Justice Marshall in his concurrence to the Court opinion in *PG&E*:

> The State seizes upon appellant's status as a regulated monopoly in order to argue that the inclusion of postage and other billing costs in the utility's rate base demonstrates that these items "belong" to the public, which has paid

> for them. However, a consumer who purchases food in a grocery store is "paying" for the store's rent, heat, electricity, wages, etc., but no one would seriously argue that the consumer thereby acquires a property interest in the store.

PG&E, 475 U.S. at 22 n.1 (Marshall, J., conc.).

Allowing CPUC to convert PG&E's envelope for its own advocacy would transform the CPUC from a regulator to an owner, which would amount to a clear case of confiscation without just compensation.

This property argument should have been dispositive, but the Court in *PG&E* then relied on the same concern with compelled speech that had proved decisive in *Tornillo*, combining property with speech rights. The *PG&E* Court stated that "[c]ompelled access like that ordered in this case both penalizes the expression of particular points of view and forces speakers to alter their speech to conform with an agenda they do not set. These impermissible effects are not remedied by the Commission's definition of the relevant property rights." *Id*. at 9.

And thus the Court melds property and the free speech concerns into an indivisible whole, concluding that the PG&E order "discriminates on the basis of the viewpoints of the selected speakers." *Id.* at 12. At this point, the *PG&E* Court is in perfect alignment with HB 20. Both require viewpoint neutrality—and *for neither* is ownership of the property that hosts speech (envelope or social media platform) dispositive for who can

control speech. Both HB 20 and *PG&E* impose nondiscrimination rights without regard to private ownership.

And the Court's justifications for imposing nondiscrimination obligations on PG&E were weaker than Texas' justifications for imposing them on SMPs. There is no suggestion that PG&E had some undisclosed network power. Nor is government regulation needed to counteract some mysterious ability of PG&E to block competitors by pulling out the support of web-based services. Rate regulation can be accomplished without confiscating private property or suppressing freedom of speech.

Hurley answered the question "whether Massachusetts may require private citizens who organize a parade to include among the marchers a group imparting a message the organizers do not wish to convey." 515 U.S. at 559. The Court held that the First Amendment answered the question in the negative.

In *Hurley*, the organizers of the St. Patrick's Day parade excluded an organization of gay, lesbian, and bisexual individuals ("GLIB") who sought to participate in the parade under its own banners. While the organizers were prepared to let them join the parade as individuals, they refused to allow the use of the banner, which was inconsistent with its own "expressive purposes." *Id.* at 574.

The Court held that Massachusetts' antidiscrimination law, MASS. GEN. LAWS § 272.98, had to take a back seat to the First Amendment. It is equally

instructive that the outcome was not changed because it was tacitly and correctly assumed that the doctrine of unconstitutional conditions prevented the state from using its monopoly power to further this end. Rather, the Court adhered to the general common law rule in this context that "innkeepers, smiths, and others who made profession of a public employment, were prohibited from refusing, without good reason, to serve a customer." *Id.* at 571 (quoting *Lane v. Cotton*, 12 Mod. 472, 484-85, 88 Eng. Rep. 1458, 1464-65 (K. B. 1701) (Holt, C.J.)) (quotations omitted). But this precedent did not require a different outcome because that rule only applied to cases of businesses without "expressive character." *Id.* at 573.

Yet this decision affords no greater support for NetChoice because *Hurley* represents a condition where the ideal competitive conditions arise. The state, as the owner of public roads, must offer all groups the chance to operate their own parades, including those in which GLIB members could play a central role. The state cannot use its monopoly power over the roads to play favorites. *See Frost v. Railroad Commission*, 271 U.S. 583 (1926). But at the same time, none of the abusive practices of the SMPs are present here. There are no network effects that give the sponsor of this parade a dominant position. There is no web support function that can upset competitor parades—no silent use of carrots and sticks to mislead the public about the government's use of its monopoly power to modify what the parades express.

B. Private monopoly's effect on the First Amendment

At this point, it is important to consider those cases where the possible presence of monopoly power in private groups influences the First Amendment analysis. In this regard, the proper point of departure is the Court's decision in *Turner Broadcasting Systems, Inc. v. FCC*, 512 U.S. 622 (1994), which reviewed the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102–385, 106 Stat. 1460 (codified in scattered sections of 47 U.S.C.).

Sections 4 and 5 of this Act introduce a "must-carry" provision that required cable television systems to carry a certain fraction of local commercial broadcast stations on their systems. *Turner*, 520 U.S. at 630. It was widely acknowledged that the restrictions in question necessarily limited the speech rights of the cable companies by forcing them to broadcast content against their will, which necessarily compromised their First Amendment rights. So the question there turned solely on whether the restrictions in question were justified in the name of the public interest. *Turner*, 512 U.S. at 187-89, 195.

On this question, "Congress concluded that unless cable operators are required to carry local broadcast stations, [t]here is a substantial likelihood that . . . additional local broadcast signals will be deleted, repositioned, or not carried, § 2(a)(15); the marked shift in market share from broadcast to cable will continue to erode the advertising revenue base which sustains free

local broadcast television, §§ 2(a)(13)-(14); and that, as a consequence, the economic viability of free local broadcast television and its ability to originate quality local programming will be seriously jeopardized, § 2(a)(16)." *Turner*, 512 U.S. at 634 (quotations omitted).

In determining whether the Act furthered these governmental interests in a sufficiently focused way, the Court refused to follow its earlier decision in *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969). There, the Court applied the permissive rational basis standard to the "fairness doctrine," a regulatory mandate that required a "right of response" to editorial opinions expressed by broadcast stations. *Id.* at 368-69. This rule was held justified as a governmental interest because of the scarcity of space for channels. *Id.* But, by the same token, *Turner* rejected the strict scrutiny standard applicable to content-based laws and upheld the statute under the intermediate scrutiny standard appropriate to content-neutral regulation.

By upholding these content-neutral restrictions on free speech, the Court breached the wall of separation between network autonomy and government regulation. But just how far does the breach extend? In *Turner*, that breach was justified because of the low risk that the must-carry regime would lead to any form of invidious viewpoint discrimination. But the current case does involve situations in which the SMPs make constant content distinctions precisely—they assert—to create a distinctive brand image or a coherent speech product. *See* Br. Hasen, Nyhan & Wilentz at 3

(citing Eugene Volokh, *Treating Social Media Platforms Like Common Carriers*?, 1 J. FREE SPEECH L. 377, 404-05 (2021)).

Yet, HB 20 explicitly forces the SMPs to make distinctions, perhaps under the *Turner* level of scrutiny. The key question is whether HB 20 can meet that higher standard. And an examination of the differences among internet, cable, and broadcast technologies suggests that it does. It should be evident that the transformations in technology between *Red Lion* in 1969 and *Turner* in 1994 are less profound than the changes in these markets over the 30 years since 1994. The cable markets of 1994 gave cable operators little power to manipulate content as the SMPs can do today. The risk of network externalities may have been present, but in a far weaker form than they are today. The control over the back end of the business through the provisions of web-based services that can be cut off without notice was not available. There was not the slightest trace of any effort by cable companies to collude with the government to influence the kinds of information that was imparted over the network. So there is, in this instance, ample justification for HB 20, a remedy that allows rival voices on matters of high principle to have an equal say on these SMPs.

III. The Fifth and Eleventh Circuits' decisions

The Court should carefully examine both the Eleventh Circuit decision in *NetChoice v Moody*, 34 F.4th 1196 (11th Cir. 2022), which offered its full-throated

defense of the freedom of speech position, and the decision of the Fifth Circuit in *NetChoice v. Paxton*, 49 F.4th 439 (5th Cir. 2022). Both extensively discuss Court precedent, specifically *Tornillo, PG&E, Turner*, and *Hurley*, and neither court takes issue with their outcomes.

The two decisions could not be more different in the way in which they deal with the common carrier issues. In *Paxton*, the Court gives a largely celebratory account of how the common carrier law is firmly based on history and precedent. *Paxton*, 49 F.4th at 468-79. But *Moody* took the exact opposite view because it claims that common carriers held themselves to serve the public without individualized bargaining, even though such behavior is common on the SMP sites that broadcast generally and do not simply serve as "dumb pipes" that deliver content from one private party to another. *Moody*, 34 F.4th at 1204.

Regardless, however, of the correct position on the historical treatment of common carrier law, the debate is not dispositive because regulation on SMPs can be justified given the market in which they operate.

Moody took the position that in their day-to-day operations, the SMPs do not operate as common carriers like the telephone companies. SMPs do more than supply pipes for their subscribers to use. They actively "curate" and "moderate" their network content. *Id.* At every stage, they claim to impose an editorial vision. It is argued that, unlike a telephone company that simply provides communications services, SMPs

attract and keep customers by offering them a consistent image to build their brand confidence and loyalty.

But the Court in *Paxton* rightly accuses the SMPs of seeking to have it both ways. They seek full discretion under the First Amendment without any correlative liability under Section 230 of the Communication Decency Act for any wrongs as "the Platforms strenuously disclaim any reputational or legal responsibility for the content they host." *Paxton*, 49 F.4th at 464. This lack of speaker and publisher liability and responsibility for the content they carry suggests that SMPs' editorial efforts might not create a "coherent speech product" attributable to the SMPs. *See* Adam Candeub, *Common Carrier Law in the 21st Century*, 90 TENN. L. REV. 813, 838-45 (2024).

But the basic objections to *Moody* go to its implicit premise that SMPs are immune from any sort of regulation simply because they might not be common carriers. In dealing with this issue, the Eleventh Circuit in *Moody* started off with an overconfident statement about the applicable principles of constitutional law:

> Not in their wildest dreams could anyone in the Founding Generation have imagined Facebook, Twitter, YouTube, or TikTok. But whatever the challenges of applying the Constitution to ever-advancing technology, the basic principles of freedom of speech and the press, like the First Amendment's command, do not vary when a new and different medium for communication appears. One of those

> 'basic principles'—indeed, the most basic of the basic—is that [t]he Free Speech Clause of the First Amendment constrains governmental actors and protects private actors.' Put simply, with minor exceptions, the government can't tell a private person or entity what to say or how to say it.

Id. at 1203 (cleaned up).

The *Moody* Court's great error here is its insistence that free speech principles never "vary" when a new or different mode of communication arises. It thus treats what should be a strong presumption as though it were absolute. But this Court has never adopted such a principle. Rather, as the discussion of the transition between *Red Lion* and *Turner* shows, technological changes in the First Amendment context get cashed out as a movement from rational basis review to intermediate scrutiny. The First Amendment changes with different challenges that different technology presents.

This principle of First Amendment adaptation is operative here, for the extraordinary abilities of SMPs to control and manipulate data and the exchange of information between people, not simply broadcast or cable transmission, subjects disfavored individuals or parties to abuse in the way in which earlier technologies did not. Further, the SMPs can coordinate with the government in the suppression of rival views on the ground of their supposed misinformation. What matters is the questionable nature of their

behavior, not any formal distinction between common carriers and the modern SMP.

CONCLUSION

The Court should affirm the Fifth Circuit's judgment.

Respectfully submitted,

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